No. 43332-0-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

vs.

Duane Rader,

Appellant.

Thurston County Superior Court Cause No. 11-1-01290-9

The Honorable Judge Lisa L. Sutton

Appellant's Reply Brief

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ARGUMENT

I. THE TRIAL JUDGE ERRONEOUSLY ADMITTED EVIDENCE OF MR. RADER'S PRIOR MISCONDUCT IN VIOLATION OF ER 403 AND ER 404(B).

A. The trial court misinterpreted ER 404(b) and incorrectly found the prior misconduct and current offense to be part of a common scheme or plan.

1. Standard of Review

The interpretation of an evidentiary rule is a question of law, reviewed de novo. State v. DeVincentis, 150 Wn.2d 11, 17, 74 P.3d 119 (2003). If the rule has been correctly interpreted, the decision to admit or exclude evidence is reviewed for an abuse of discretion. Id.

A trial court abuses its discretion when its order is manifestly unreasonable or based on untenable grounds. State v. Depaz, 165 Wn.2d 842, 858, 204 P.3d 217 (2009). An erroneous ruling requires reversal if it is reasonably probable that the error affected the outcome. State v. Everybodytalksabout, 145 Wn.2d 456, 468-69, 39 P.3d 294 (2002).

2. Evidence of prior misconduct is generally inadmissible.

Under ER 404(b), "[e]vidence of other... acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as

proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." ER 404(b) must be read in conjunction with ER 403, which requires that probative value be balanced against prejudicial the danger of unfair prejudice.[1] State v. Fisher, 165 Wn.2d 727, 745, 202 P.3d 937 (2009).

A trial court "must always begin with the presumption that evidence of prior bad acts is inadmissible." DeVincentis, at 17-18. The state bears a "substantial burden" of showing admission is appropriate for a purpose other than propensity. DeVincentis, at 18-19. Prior to the admission of misconduct evidence, the court must (1) find by a preponderance of the evidence the misconduct actually occurred, (2) identify the purpose for which the evidence is offered, (3) determine the relevance of the evidence to prove an element of the crime, and (4) weigh the probative value against the prejudicial effect. Fisher, at 745. Doubtful cases must be resolved in favor of exclusion. State v. Thang, 145 Wn.2d 630, 642, 41 P.3d 1159 (2002); State v. Wilson, 144 Wn. App. 166, 176-178, 181 P.3d 887 (2008).

[1] ER 403 provides that relevant evidence "may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence."

3. Evidence of Mr. Rader's prior misconduct was not admissible to prove a "common scheme or plan."

The Supreme Court has called for caution in applying the common scheme or plan exception. DeVincentis, at 18-19. Erroneous admission requires reversal whenever it is reasonably probable that the error materially affected the outcome of the trial. Wilson, at 178.

"Common plans" fall into two distinct categories. The first is where multiple acts, including the crime charged, are part of a larger overarching criminal plan.[2] The second category involves a single plan that is "used repeatedly to commit separate, but very similar, crimes." DeVincentis, at 19. Only this second type of plan is relevant here.

Evidence of this second type of plan requires the state to establish "[a] high level of similarity… 'the evidence of prior conduct must demonstrate not merely similarity in results, but such occurrence of common features that the various acts are naturally to be explained as caused by a general plan of which the charged crime and the prior misconduct are the individual manifestations.' …[T]he degree of similarity for the admission of evidence of a common scheme or plan must be substantial." DeVincentis, at 19-20 (quoting State v. Lough, 125

[2] For example, when a person steals a weapon for use in a robbery, the theft is part of a larger plan.

Wn.2d 847, 860, 889 P.2d 487 (1995)). Furthermore, the prior misconduct must show a "'strong indication of a design (not a disposition).'" Lough, at 858-859 (quoting 2 JOHN HENRY WIGMORE, EVIDENCE § 375, at 335).

4. The evidence does not show a common scheme or plan.

In this case, the record does not show that Mr. Rader used a common scheme to create the opportunity to commit each offense. See Appellant's Opening Brief, pp. 24-28. Nor does the evidence show a substantial degree of similarity between the current offense and the prior misconduct. Nor does it strongly indicate a design rather than a disposition. See Appellant's Opening Brief, pp. 28-33; cf Lough, at 850-851, 855, 861; DeVincentis, at 13-18. Mr. Rader was not "the mastermind of an overarching plan"[3] to meet and marry women so that he could abuse them; instead, he was a man with a propensity toward domestic violence.

Propensity evidence has no place in a criminal trial: "ER 404(b) is a categorical bar to admission of evidence for the purpose of proving a person's character and showing that the person acted in conformity with that character." State v. Gresham, 173 Wn.2d 405, 420, 269 P.3d 207 (2012). There are no exceptions to this rule. Id, at 421.

[3] Lough, at 861.

Without citation to any authority, Respondent suggests that Mr. Rader's misconduct toward Ria Rader was relevant to the issue of Heather Rader's credibility. Brief of Respondent, p. 8. This argument relies on Mr. Rader's propensity toward domestic violence – i.e. 'Heather Rader is credible because Mr. Rader has a propensity to commit domestic violence as shown by his prior misconduct against Ria Rader.' This is quite different from allowing the jury to assess a recanting victim's credibility on the basis of prior acts of violence committed against that same victim. See, e.g., State v. Magers, 164 Wn.2d 174, 189 P.3d 126 (2008).

The evidence here did not establish a common scheme or plan. Mr. Rader's convictions must be reversed because they were based in part on propensity evidence. Gresham, at 433-434. The case must be remanded with instructions to exclude the evidence of prior misconduct. Id.

B. Any common scheme or plan was irrelevant to prove the elements of each offense.

Mr. Rader rests on the argument set forth in Appellant's Opening Brief at pp. 33-35.

C. The probative value of the misconduct evidence was substantially outweighed by the danger of unfair prejudice.

Mr. Rader rests on the argument set forth in Appellant's Opening Brief at pp. 33-35.

D. The error was not harmless.

Mr. Rader rests on the argument set forth in Appellant's Opening Brief at pp. 36-38.

II. THE TRIAL COURT SHOULD NOT HAVE ADMITTED IRRELEVANT EXPERT TESTIMONY ON THE "GENERAL DYNAMICS" OF DOMESTIC VIOLENCE.

Irrelevant evidence is inadmissible at trial. ER 402. ER 401 defines relevant evidence as "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Under ER 403, even relevant evidence "may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." Where the evidence is provided through expert testimony, it must also be helpful to the jury. ER 702.

Here, the trial judge allowed an expert to testify about "the general dynamics of domestic violence." CP 29. Although perhaps motivated by a

desire to allow the prosecution to explain the victim's reporting delay, the court's ruling permitted far more than was relevant or necessary to explain that delay. See Appellant's Opening Brief, pp. 38-42.

The state made little or no attempt to link the general evidence to the facts of this case or the elements of any offense. See Appellant's Opening Brief, pp. 39-42. As a result, the testimony included profile evidence of a type that has been rejected by Washington courts. See, e.g., State v. Braham, 67 Wn. App. 930, 937, 841 P.2d 785 (1992) (reversing conviction because the prosecution introduced general expert testimony offered to provide background information on the nature of child abuse cases).

The evidence should have been limited to information that would help the jury understand Heather Rader's lies about her injuries or her delay in reporting. By authorizing testimony on the "general dynamics of domestic violence," the trial court went far beyond the scope of ER 401, ER 403, and ER 702.

This evidence was inflammatory, irrelevant, and highly prejudicial. Accordingly, Mr. Rader's convictions must be reversed and the case remanded with instructions to exclude evidence on the "general dynamics of domestic violence." Braham, at 937.

III. THE TRIAL JUDGE VIOLATED MR. RADER'S PHYSICIAN-PATIENT PRIVILEGE.

The physician-patient privilege applies in criminal cases "so far as practicable." RCW 5.60.060(4); RCW 10.58.010. Except in unusual circumstances, it prohibits a party from introducing confidential communications between patient and doctor. State v. Gibson, 3 Wn. App. 596, 600, 476 P.2d 727 (1970). The Washington Supreme Court has never determined when, if ever, a trial court can overrule an accused person's assertion of the privilege in a criminal case.[4]

The Court of Appeals has held that the privilege may be denied only when the public's interest in full revelation of the facts outweighs the benefits of the privilege. State v. Smith, 84 Wn. App. 813, 820, 929 P.2d 1191 (1997). In Smith, the evidence at issue consisted of blood test results, rather than confidential communications between patient and doctor. The Smith court was able to identify a number of factors tilting the balance in favor of admission. Id, at 820-822.

None of the factors outlined in Smith favor admission in this case. See Appellant's Opening Brief, pp. 44-48. Accordingly, the privilege

[4] Prior to 1985, the court's decisions were controlled in part by former RCW 10.52.020 (Repealed by Laws 1985, ch. 68, § 1), which provided that "physicians...shall be protected from testifying as to confessions, or information received from any defendant, by virtue of their profession and character..." See, e.g., State v. Sullivan, 60 Wn.2d 214, 373 P.2d 474 (1962).

should not have been abrogated, and the evidence should have been excluded. Gibson, at 600.

IV. CUMULATIVE ERROR

Mr. Rader rests on the argument set forth in Appellant's Opening Brief, pp. 49-50.

V. THE EVIDENCE WAS INSUFFICIENT TO PROVE THAT THE CRIMES OCCURRED WITHIN SIGHT OR SOUND OF ANY MINOR CHILD.

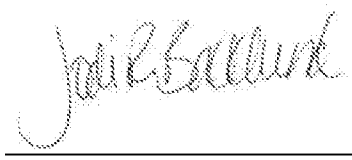
Mr. Rader rests on the argument set forth in Appellant's Opening Brief, pp. 50-53.

CONCLUSION

For the foregoing reasons, the convictions must be reversed and the case remanded for a new trial. The "sight or sound" aggravating factor must be dismissed with prejudice.

Respectfully submitted on February 4, 2013,

BACKLUND AND MISTRY



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CERTIFICATE OF SERVICE

I certify that on today's date:

I mailed a copy of Appellant's Reply Brief, postage prepaid, to:

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With the permission of the recipient(s), I delivered an electronic version of the brief, using the Court's filing portal, to:

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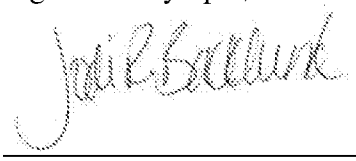
I filed the Appellant's Reply Brief electronically with the Court of Appeals, Division II, through the Court's online filing system.

I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed at Olympia, Washington on February 4, 2013.



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